CENTER *for* BIOLOGICAL DIVERSITY

VIA ELECTRONIC MAIL

April 26, 2010

United States Army corps of Engineers
Attn: CEWC-CE, Douglas J. Wade
441 G Street NW
Washington, DC 20314-1000
Douglas.J.Wade@usace.army.mil

Re: COE-2010-0007: Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls.

Dear Mr. Wade,

The Center for Biological Diversity (the "Center") joins in the comments submitted by California Trout and the Matilija Coalition (of which the Center is a member). In addition, the Center provides the following comments in opposition to the proposed Docket Number COE-2010-0007: Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls ("proposed policy"). The Center is a non-profit organization with over 200,000 members and online activists. The Center is dedicated to protecting imperiled species and their habitats through science, public policy, and the law.

Because the proposed policy is unlikely to achieve its stated goal of protecting levees and floodwalls and is likely to have a devastating impact on riparian vegetation, riparian species and aquatic species including many imperiled species, the Center urges the Army Corps of Engineers ("Corps") to revise the proposed policy and prepare additional environmental review in the form of an Environmental Impact Statement before considering adoption of the policy as well as completing consultation with the wildlife agencies as required by the Endangered Species Act ("ESA"), 16 U.S.C. §1536(a)(2).

Public Safety as a Recognized Necessity

The Center fully recognizes the need to protect and maintain public safety. However, the notion that these proposed rules will enhance public safety is predicated on the idea that the protection of the natural values of vegetation on levees directly conflicts with public safety. There is not adequate research on the relationship of vegetation and levee stability to support a vegetation management change of this scale. In fact, Corps' regulations 33 CFR, Part 208 recognize that vegetation can improve public safety by reducing the potential for levee erosion - "Where practicable, measures shall be taken to retard bank erosion by planting of willows or other suitable growth on areas riverward of the levees." Additionally, the Corps Technical Report

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REMR-EI-5 (Corps, Effects of Vegetation, 1991), "The Effects of Vegetation on the Structural Integrity of Sandy Levees," report concluded that "even low root concentrations as measured along selected transects in the sandy levee sufficed to make the slope more secure under 'worst case' scenario conditions."

In the wake of an event such as levees failures during Hurricane Katrina, 2005, we recognize that evaluation, response, and change is often needed to prevent future such tragedies. However, in the July 31, 2006 report, "New Orleans Levee Systems Hurricane Katrina" the Independent Levee Investigation Team did not support a finding of poor performance of levees due to the presence of woody vegetation.

Tree growth, especially on the lower portions of the levees in the native banks or waterside slopes, often has beneficial effects (Shields, Gray 1992; Corps, Effects of Vegetation, 1991), including the stabilization of levee materials, the reduction of erosive forces and the slowing of higher flows, which in turn encourages the deposition of sediments. These factors do not undermine, but rather enhance public safety. The proposed vegetation policy will likely result in devastating environmental impacts by removing vast areas of vegetation deemed critical for the support of fish and wildlife. Additionally, the removal of said vegetation will eliminate the vegetation's potential public safety enhancement values.

Environmental Impacts and Environmental Law

The removal of significant amounts of vegetation from levees would result in the loss of critical riparian corridor habitat upon which many of our listed endangered, threatened, and sensitive species depend. For example, the policy could lead to the loss of significant riparian habitat occupied by the Southwestern willow flycatcher and least Bell's vireo in streams in southern California. Such effects could result in cumulative losses to the most vulnerable species and reverse fragile gains made in protecting these species. Moreover, some the vegetation that may be affected by the policy was planted as mitigation for earlier projects and its loss would create a need to find or create additional similar habitat elsewhere. Additionally, preserving riparian habitats not only benefits the species that use that vegetation type but also is an important component for protecting food web dynamics and providing necessary shading for aquatic species. These foreseeable and potentially cumulatively significant environmental impacts must be considered before the proposed vegetation policy may be approved. Given the potential scope of impact, an Environmental Impact Statement in accordance with the National Environmental Policy Act (NEPA) must be prepared and ESA consultation initiated.

Moreover, the proposed management of existing variances specifies blanket invalidation for all existing levee variances unless a new variance is sought by levee sponsors/operators by 30 September 2010, less than 5 ½ months from now. In order to submit for a new variance, levee sponsors/operators are responsible to comply with NEPA and ESA requirements, for which the documentation alone will take more than the allowed time. Additionally, under Corps requirements, the variance requester must disclose the extent of the root systems of species at maturity proposed to be found on or near the levee. Yet the Corps has been hoping to launch a research program to understand the species and conditions of root systems near and within levees because the Corps has established that such information is essentially, as of now, unavailable.

Therefore, the establishment of the proposed variance process will in essence create a de facto policy which will largely eliminate vegetation variances and lead to wholesale riparian clear-cutting, much of which will include the destruction of mitigation habitats.

The statement in the Draft EA and FONSI that "changing the process for applying for a variance does not itself affect the environment. It is the decisions on specific variance requests that may affect the environment" is misleading. Because the policy change would invalidate existing variances and set a very short, unrealistic deadline for applying for new variances, the policy change itself may have a profound impact on the environment. It is well settled that in such circumstances an agency cannot rely on a FONSI. *See, e.g., Ocean Advocates v. United States Army Corps of Eng'rs*, 361 F.3d 1108, 1124 (9th Cir. 2004) (An agency can only issue a FONSI in lieu of an EIS if it puts forth "a convincing statement of reasons that explain why the project will impact the environment no more than insignificantly."(citations omitted)); *Klamath-Siskiyou Wildlands Center. v. BLM*, 387 F.3d 989, 995 (9th Cir. 2004) (an agency cannot issue a FONSI where it relies on an EA that is "silent as to the degree that each factor will be impacted and how the project will reduce or eliminate the identified impacts.")

In the landmark study "SOS: California's Native Fish in Crisis,"[1] habitat degradation/destruction is identified as one of the most significant factors threatening our native fish across the state. Of the 32 native salmonids in the state, 1 is already extinct, 13 are listed under endangered species laws, and 20 overall may be extinct within this century if protection and restoration efforts are not made a priority. Given the loss of the majority our riverside and streamside habitats, the preservation of the remaining riparian corridors is essential for our fisheries survival. Environmental impacts of this scale and magnitude cannot be deemed as having a "Finding of No Significant Impact." This is a clear violation of the intent and letter of environmental protection law.

Effective Policy Decisions

The Corps has stated that their proposed policy has been "peer reviewed," but the Corps' actions seem to fail to recognize that the peer review resulted in significant concerns about the proposed actions and found a significant lack of supporting research. [*See* "Revised Final Independent Peer Review for U.S. Army Corps of Engineers Vegetation Policy for Local Flood Damage Reduction Systems" (Battelle Peer Review, 2008)]

For many years the Corps has participated in the California Levees Roundtable (CLR) working in an informed stakeholder process to examine and address issues which include those associated with the proposed vegetation variance process. Apparently understanding the need for more information and research, the Corps' Engineer Research and Development Center (ERDC) was engaged in collaborative research efforts with the CLR California Levee Vegetation Research Program (CLVRP) to specifically examine these issues. Despite this seemingly reasonable approach, the Corps proposed policy changes without the benefit of these research results, and outside of the purview of these existing collaborative relationships.

[1] Available at *www.caltrout.org/**SoS-Californias-Native-Fish-Crisis**.pdf*

Given the complexity of the problem, the variable nature of situations across the country to which this policy would be applied, and the widely accepted understanding that levee vegetation enhances rather than threatens public safety, it is poor policy making to move forward with the proposed process. Additionally, with extensive research underway, and a broad spectrum of qualified, interested stakeholders (CLR members are but a few of these) engaged in examination of the issues at hand, a return to a collaborative approach should be made.

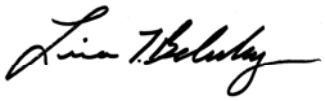
Summary

The proposed policy does not effectively address public safety enhancement needs because vegetation has not been found to cause levee failure, and in fact in some cases it is believed that it enhances public safety. The proposed policy violates environmental law by: failing to provide an EIS as required under NEPA to consider the direct, indirect, and cumulative effects created by this policy change; failing to ensure against jeopardy and destruction or adverse modification of critical habitat through consultation with the wildlife agencies; and by issuing timetables for permitting new and re-permitting exiting variances that will make mandated environmental review impossible. The Corps should not issue a policy that will push levee managers to choose between complying with Corps regulation and complying with environmental laws and the Corps should not adopt a policy that require wholesale clearcutting of countless riparian corridors, including mitigation vegetation without adequate environmental review. Because the Corps has ignored the findings of peer review research findings, abandoned the effective stakeholder processes that were developed, and dismissed its own determinations regarding vegetation on levees and the need for more research and further understanding of the issues and circumstances at hand in order to effectively address the policy needs, the Corps' approach to this issue is wholly without merit.

The Center respectfully requests that the Corps withdraw and, through more sensible, collaborative processes, redraft the proposed policy.

Please do not hesitate to contact me if you have any questions regarding these comments.

Sincerely,



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